THE CO-OPERATION OF "LAW" AND "EQUITY;" AND THE ENGRAFTING OF EQUITABLE REMEDIES UPON COMMON-LAW PROCEEDINGS.

WE have all enjoyed something of the fascinating interest of those chapters in the history of English law which delineate the antagonism and rivalry so long maintained between chancery and the courts of law.

If I am not mistaken, our appreciation of the significance of that contest will be much enhanced by a survey of the present friendly relations between the two systems, which were developed in that contest.

But it is not on that account that I invite my reader's attention to the modern co-operation between law and equity, but rather because the details and the conditions of this co-operation form the greatest complexity in American law, and present many of the most perplexing questions in procedure; and, what is still more important, it is chiefly through the paramount influence which the principles of equity, in the course of this co-operation, are steadily gaining over the traditional rules of the common law that the present remarkable growth of the domain of law goes on.

For the purposes of this outline of the present relations of the two systems it will be convenient to use the terms "law" and "equity" respectively, not merely as indicating contrasting systems of doctrine, nor, on the other hand, merely as different methods of practice, but rather, in the entirety of their characteristic meanings, as each designating one of the two great organized systems of investigation of facts and determination of rights, together with the rights themselves, which, through the long-continued operation of such method, have obtained recognition as a part of our law. My purpose is, by outlining some typical instances of each procedure, with its own results (so far as engaged in this co-operation), to exhibit clearly the nature of the change which is going on, and to show, by some illustrations, how far common-law courts have already got possession of some equity powers, and common-law actions have begun to be modified by the consequent infusion of equitable principles. However strictly a common-law court without equitable powers may be bound to apply

common-law principles in entire disregard of equity, yet as fast and as far as equity powers are conferred upon such a court, it must wield them upon equitable principles whenever the facts are such that a court of equity would do so. In other words, an equitable remedy engrafted upon a common-law action must bear an equitable fruit; and this is the experience of all our courts under the new procedure.

So far as concerns the improvement of the administration of justice in civil cases, the chief gain in procedure in this country during the last fifty years has been in simplifying the co-operation of "law" and "equity" in the manner of which Discovery is a striking instance. The devising and getting into good working order such methods has been a slow process. The time necessary for the bar to become familiar with any such change, and to learn its advantages, has been found to be considerable. Men who knew only the old methods, and were not open-eyed towards the new, were baffled and annoyed. Men who were ignorant of the old took hold quickly of the new, and bungled and floundered about, as they still do. Men who saw in the new a better instrument to do the old work quicker and more thoroughly have made what progress has been made, and have carried the others along with them. In this great movement, complexities often quite serious to the practitioner and to the client have been occasioned, and still continue, by reason of written constitutions and of differences of policy in different jurisdictions. Under such various predetermined constitutional and statutory restrictions it has only been by means of different devices, and what may be called different experiments in different States, that the progress of this co-operation of "law" and "equity" and the transferring of equitable remedies to legal actions has steadily advanced.

Thus regarded, the history of equity may be traced in three chapters: *First*, the contest for supremacy over law; *second*, co-operation with law; *third*, interchange of powers. These three processes occupy successive periods, overlapping each sufficiently to preserve the continuity of the fundamental distinction between the systems. Taken together, they explain the present uncertainty which exists in so many minds as to where that distinction lies; and they point with unerring certainty to a further development of equitable remedies under common-law forms.

If any of my readers have observed with regret the departure from old methods which this change involves, the facts to be here

noted may perhaps bring the conviction that the advance is absolutely irresistible, and that the best as well as the easiest thing to do is to face forward and take advantage of the current. If any are impatient of its slow progress, and would like to wipe out all distinctions between the two systems at one stroke, I would suggest that the distinction between these two great systems not only originated in the nature of the government under which they grew up, but that it fits the different types of men who are concerned in the administration of justice. It is the change in the nature of government which rendered the present progress possible; it is the abundance of men who by temperament and training are excellent common-law judges and attorneys-at-law, but indifferent chancellors and solicitors, and *vice versa*, which makes the progress of the change slow. When the training of the bar shall have become so broad and thorough that the profession generally become fairly apt in both systems, we shall all agree readily in combining the useful features of both in one. If a view of the present situation of the subject will aid any of my readers in these respects, the present purpose will be accomplished.

For the first illustration of the change we are considering, let us take the subject of Discovery. It is perhaps chiefly for its instructive value as an instance of the court of chancery engaged in aiding a suit at law that the Bill of Discovery, although now practically almost obsolete, is allowed so considerable a place in text-books and courses of study.

It may almost be said that in the courts of most of our States the Bill of Discovery is no longer in existence. Even though the power to entertain it remain, the new instrument which the statutes have put into the hands of the common-law courts to take its place is so much more efficient, and so much less dangerous, and commonly so much less expensive, that no one wishes to try a Bill of Discovery if he can help it.

It is not alone the "Code States," so-called, that have abandoned it. Massachusetts has laid it aside almost if not quite as completely as New York. And in the United States Circuit Courts, where the procedure in actions of a common-law nature follows the State court practice, suitors who have occasion to seek Discovery in aid of such an action are embarrassed by their inability to use in that court the simple remedies which in their other practice have been found so much more convenient than the old bill in equity.

The functions of that ancient and ponderous procedure may be thus exhibited: —

ACTIONS AT LAW AIDED BY SUITS IN EQUITY. I. DISCOVERY.

ACTION AT LAW.

EQUITY AIDING PLAINTIFF.

Intending plaintiff at law may, before suing at law, file BILL OF DISCOVERY, to ascertain names of an intended defendant; [1] or for facts or documents to enable to sue.[2]

ANSWER
by defendant in equity making discovery.

ORDER
(when necessary) that defendant allow inspection of documents.

[NO DECREE.] [3]

Plaintiff drops his bill, and sues at law. ☞

WRIT.

DECLARATION.

[Defendant may, before plea, ☞

EQUITY AIDING DEFENDANT.

file a

BILL OF DISCOVERY
to ascertain facts or documents to enable him to plead.[4]

ANSWER
by plaintiff at law, who is defendant in equity, making discovery.

ORDER
(when necessary) that plaintiff at law allow inspection of documents.

[NO DECREE.]

Defendant drops his bill ☜ and pleads at law.

[Further proceedings at law may be stayed meanwhile by injunction in equity on defendant's bill of discovery.] [5]

PLEA, &c.

☜ ISSUE JOINED. ☞

Plaintiff at law may, after issue at law, file BILL OF DISCOVERY to get evidence — documents [6] as well as testimony [7] — to support his case, but not to get his adversary's evidence.[8]

ANSWER
by defendant at law making discovery.

ORDER
for inspection of documents.

[NO DECREE.] ☞

[Further proceedings at law may be stayed by injunction on either party's bill of discovery.] [9]

Defendant at law may, after issue at law, file BILL OF DISCOVERY to get evidence — documents as well as testimony — to support his case, but not to get his adversary's evidence.[10]

ANSWER
by plaintiff at law making discovery.

ORDER
for inspection of documents.

☜ [NO DECREE.]

TRIAL.

Answer [11] or documents produced [12] in chancery, produced as evidence at law.

VERDICT and JUDGMENT.

Notes of Cases on the Foregoing Procedure.

1. Heathcote *v.* Fleete, 2 Vern. 442. This was a bill to discover owner of lighter, to enable plaintiff to bring an action for damages caused by negligence. [It does not appear whether Fleete was reputed owner or not.]

The necessary relation of the defendant in discovery to the cause of action at law is well stated by Judge Field in Post *v.* Toledo &c. R. Co., 144 Mass. 341.

2. Chadwick *v.* Broadwood, 3 Beav. 308; s. c. Langd. Cas. in Eq. Pl. 173. This bill alleged that plaintiff was heir-at-law of C, that defendants were in possession of lands which belonged to C, which C was said to have demised to them for a long term; that said term had expired, but defendants refused to surrender. Prayer for discovery of the leases under which defendants held, and receipts and acknowledgments for rent paid, claimed to be in their possession, — without which discovery plaintiff was unable to proceed at law.

But complainant must show he has a cause of action at law. Mynd *v.* Francis, 1 Anstr. 5. This was a bill by one intending to sue as a common informer, under Gaming Act, to discover sums won by defendant; *held*, not to lie, since complainant, not alleging that he had commenced an action at law, had not acquired the character of a common informer under the statute.

3. Chancery has no power to decree relief on a bill of discovery. Brown *v.* Thornton, 1 Myl. & C. 243. Here the Vice-Chancellor's order that defendant in equity, who had made discovery, produce specified documents upon the trial of the action at law, was discharged by the Chancellor, on the ground that this would be giving relief besides discovery.

But it may order such provisional relief as is consequential to the prayer for discovery, as injunction against proceeding at law meanwhile. Brandon *v.* Sands, 2 Ves. Jr. 514.

4. Lampridaye *v.* Rutt, 1 L. J. Ch. 13. Action at law pending to recover for repairs to defendant's house. Defendant filed bill for discovery of the various items making up the sum sued for, as necessary for the purpose of his defence at law, and also prayed an injunction meantime.

General demurrer to bill; argued that bill was in fact a bill for an account; that it was superfluous, as plaintiff at law might be forced to deliver a bill of particulars, and would be obliged to prove the items on the trial at law. Demurrer overruled. (V. C.) "A party to a suit at law may put the other party to his oath in this court as to anything which may enable him to sustain or defend the action, whether it actually turns out to be useful to him or not."

And although the action at law for damages may be based upon an indictable offence, the defendant may have discovery of facts and documents in aid of his defence, especially, it seems, where the defence is a justification. Macauley *v.* Schackell, 1 Bli. N. R. (H. of L.) 96; Libel; plaintiff at law ordered to allow inspection of letters, etc.

So, also, where the defence sought to be aided is the illegality of the contract, even though defendant shows himself *in pari delicto*. Benyon *v.* Nettleford, 3 MacN. & Gor. 94. (Contract for future illicit intercourse.)

5. Macauley *v.* Schackell, 1 Bli. N. R. (H. of L.) 96, allowing defendant at law (who was plaintiff in equity) an injunction staying the action at law pending discovery and inspection.

6. Brandon *v.* Sands, 2 Ves. Jr. 514, where the Chancellor sustained a bill by assignees of bankrupt to have discovery of defendant's "books, papers, and writings," relating to the bankrupt's gaming losses, to recover which the assignees had theretofore brought an action at law.

7. Thomas *v.* Tyler, 3 Y. & Colly. 255; s. c. Langd. Cas. in Eq. Pl. 41. Bill alleged death of plaintiff's only witness pending trial, and plaintiff's consequent default; that defendants threatened to move for a nonsuit; that plaintiff could not go to trial without discovery as to specified matters, including conversations between defendants and plaintiff's deceased witness; and prayed discovery and injunction against moving for nonsuit. Demurrer to bill overruled, and answer ordered, with injunction staying proceeding at law.

8. In Combe *v.* City of London, 4 Y. & Colly. 139, 155, which was a bill filed by defendant at law to obtain inspection of the city's records, the Lord Chancellor (Baron Abinger) said: "A party has a right to compel the production of a document in which he has an equal interest — though not equal in degree, yet to a certain extent equal — with the party who detains it from him. In that case he may file a bill for discovery, for the purpose of obtaining such facts as may tend to prove his case; and if those facts are either in the possession of the other party, or if they consist of documents in the possession of the other party in which the other (the applicant) has an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced. . . .

"But has he a right as against the defendant to discover the defendant's case? . . . The ground on which he files his bill is to make the defendant discover what is material to his (the plaintiff's) case; but he has no right to say to the defendant: 'Tell me what your title is; tell me what your case is; tell me how you mean to prove it; tell me what evidence you have to support it; disclose the documents you mean to make use of in support of it; tell me all these things, that I may find a flaw in your title.' Surely that is not the principle of a bill of discovery."

Note that if the evidence desired is material to complainant, it is no defence to a discovery that it is also material to defendant. Smith *v.* Duke of Beaufort, 1 Hare, 507; affirmed in 1 Phill. Ch. R. 209, and *ubi infra*.

9. Brandon *v.* Sands, *supra*, where an injunction was allowed restraining defendants from proceeding to nonsuit at law, pending discovery. And see Thomas *v.* Tyler, *supra*.

10. In Combe *v.* City of London, 4 Y. & Colly. 139, which was a bill filed by defendant at law to obtain evidence in aid of his defence at law, the Chancellor (Baron Abinger) discusses the principles under which the defendant in equity is compelled to disclose evidence in his possession. See quotation from his opinion in note 8.

11. Or an examined copy, where attorney for adverse party admitted the filing of the bill for discovery against his client. Hodgkinson *v.* Willis, 3 Campb. 401.

12. He who made discovery must produce the documents he disclosed, or the one who compelled him to make discovery may give secondary evidence.

In connecting that secondary evidence, if the document was written or signed by his adversary, proof of that fact is sufficient (Sturge *v.* Buchanan, 10 Ad. & El. 598); if it proceeded from a third person, and did not bind the adversary, then the bill and answer, under which defendant was required to disclose it, must be produced to give him the benefit of any explanations which he may have made in his answer respecting it (Hewitt *v.* Pigott, 5 C. & P. 75).

ILLUSTRATIVE INSTANCES OF DISCOVERY AIDING ACTION AT LAW.

1. Duke of Beaufort *v.* Smith.

(*a*) *Action at Law* [not reported]. The Duke of Beaufort brought *assumpsit* against Smith to recover tolls claimed to be due for coals raised by defendant from the duke's lands, by reason of a custom or prescriptive right. Plea: general issue.

(*b*) *Suit in Equity* [May, 1842] (1 Hare, 507; s. c. Langd. Cas. in Eq. Pl. 571). Thereafter the defendant Smith filed a bill of discovery in aid of his defence to the above action, alleging, among other things, variances from time to time in the rates of toll which had been charged, insisting therefore that the custom claimed did not exist; and alleged certain documents in the duke's possession, consisting of surveys, books, etc., which showed the terms of the alleged custom.

The duke's answer set forth his claim to the tolls, admitted the possession of the various documents, and admitted the variances in the tolls, but denied that they would show the truth of the matters claimed in the bill save as explained in the answer; and further alleged that such documents (annexing a schedule thereof) were his muniments of title, had no relation to any right of complainant, nor were they material to complainant's defence at law, nor had complainant any interest in them.

On complainant's motion, the Vice-Chancellor ordered the production of most of the documents, on the ground that the answer admitted the alleged variance, and therefore the documents showing this variance were evidence of a case complainant had made by his bill.

[November, 1842] (1 Phill. Ch. R. 209; s. c. Langd. Cas. in Eq. Pl. 578). An appeal from this decision was dismissed by the Chancellor (Lord Lyndhurst).

(*c*) *Action at Law* [1849; reported in 4 Ex. R. (W. H. & G.) 450]. The action at law was then brought on before the full bench on an agreed case, which included excerpts from the documents of which defendant had thus obtained inspection; and the plaintiff at law had judgment.

2. BURRELL *v.* NICHOLSON.

(*a*) *Action at Law* [1832] (3 B. & Ad. 649). In trespass against a constable for entering plaintiff's house to distrain for poor-rates, defendant acting on behalf of parish officers, the issue was whether plaintiff's house was within the parish. Plaintiff asked the parish attorney for leave to inspect the parish records to ascertain as to the fact, and on refusal took order to show cause why he should not be allowed to inspect the records, notice of the application being given to parish. The application was denied, on the theory that the applicant must show an interest in the books; but here he disclaimed being a parishioner, and hence disclaimed an interest.

(*b*) *Suit in Equity* [August, 1833] (1 Myl. & K. 680; s. c. Langd. Cas. in Eq. Pl. 471). Plaintiff, having failed in his application at law (as above), filed a bill for discovery against the vestry clerk and parish officers. The answer of the defendant clerk admitted possession of a number of the documents specified in the bill; and plaintiff moved for an inspection.

The Chancellor, in ordering an inspection, stated that the question being one of boundary, the parish records contained evidence common to both,— the evidence of the title of both; and that the papers being voluminous enough to fill a room, it would be a grievous thing to relegate plaintiff and the court to the feeble aid of a *subpœna duces tecum*, with no previous inspection.

(*c*) *Action at Law* [December, 1833] (6 C. & P. 202; s. c. 1 M. & Rob. 304). The action at law was then brought to trial; verdict for the defendant, but afterward set aside on motion for new trial.

In many of the State courts of general jurisdiction this process of co-operation of different courts has been superseded by statutes clothing the courts with power to compel the parties to a common-law action to submit to examination, and to produce documents for

inspection, upon a simple motion in the cause. This addition of an equitable power to the resources of common-law courts has been made in different ways and with various limitations. The useful point to notice here is that wherever and however made, it is understood that the common-law court is performing an equitable function; and in all substantial matters affecting the rights of parties, and the privileges of testimony and documents, the common-law court must keep up to the purpose and within the limits marked out by the course and practice in chancery. Another significant fact is that the courts sitting in equity have generally recognized this change as terminating their own function of entertaining bills of mere discovery (save in exceptional instances, where no common-law action within the jurisdiction is pending), and to a considerable extent have ceased, even on bills for discovery and relief, to use their old method in any case where the simpler motion provided for the common-law courts is available in a strictly equitable suit.

For an illustration of this change carried out in a manner more complete, perhaps, than has been yet adopted in most jurisdictions, let us advert to the discovery of testimony and documents under the New York Code of Civil Procedure.

That Code contains an express abolition of suits for discovery in aid of another action or defence (§ 1914). The substitute it gives may be thus outlined: —

EQUITABLE REMEDIES ENGRAFTED UPON LEGAL ACTION.
I. DISCOVERY.

ACTION UNDER NEW YORK CODE.

[The statute requiring United States Circuit Court practice to conform to State court practice as near as may be, does not sanction examination before trial,[1] nor order for discovery of documents[2] in the Federal court.]

Either expected party in an intended action may, before commencement of an action (by order in the discretion[3] of the court), examine the other to perpetuate his testimony.[4]

SUMMONS.

Plaintiff may sue an anonymous or unknown defendant by designating him by a description, and amend after ascertaining name.[5]

After service of summons, plaintiff may (by order of court in its discretion)[4] examine defendant to learn whom to join as additional defendants,[6] or to enable plaintiff to frame his complaint,[7] and may have discovery of documents for like purpose.[8]

COMPLAINT.

Defendant may (by like order) examine plaintiff,[7] and discover documents to enable defendant to frame his answer.

ANSWER.

Either party may (by like order) examine the other before trial,[7] and either party may at the trial use the testimony so taken.[9] Either party may (by the order) have discovery of documents, before trial, for use on the trial.[8]

Notes to Above Procedure.

1. *Ex parte* Fisk, 113 U. S. 713, 723, 725,—holding that, notwithstanding U. S. R. S., § 914, which makes the Circuit Court practice in common-law causes "conform as near as may be" to the State court practice,—a State statute allowing compulsory examination of a party in advance of the trial is not applicable in the Federal court, because U. S. R. S., § 861, requires examination in open court.

Whether testimony can be taken for perpetuation, if shown to be necessary to prevent a delay or failure of justice in a Federal court (113 U. S. 724), or whether testimony so taken in a State court for perpetuation can be read in the Federal court (U. S. R. S. § 867), are different questions.

2. So ruled in the Southern District of New York.

3. Jenkins *v* Putnam, 106 N. Y. 272.

4. N. Y. Code Civ. Proced., §§ 870, 871. The statute is somewhat broader than the statement above.

5. N. Y. Code Civ. Proced., §451.

6. Glenney *v.* Stedwell, 64 N. Y. 120; s. c. 1 Abb. (N. C.) 327, with extended note on the practice.

7. Id.

8. N. Y. Code Civ. Proced., § 803, etc.; N. Y. Rule 14 of 1888. This practice was introduced by the English common-law courts in view of the fact that the party could then file a bill of discovery, and stay proceedings at law meanwhile; and the New York courts in 1811, and perhaps earlier, adopted (under some restrictions) the same practice where the document was the immediate foundation of the action or defence, or where forgery was alleged. In 1828, on the suggestion that the power was limited, and in many cases doubtful, and that it should be made clearly co-extensive with the well settled power of chancery (3 R. S., 2d ed., 676), the Legislature, by a new provision in the New York Revised Statutes, gave the Supreme Court general power, "in such cases as may be deemed proper," to compel discovery of documents, being governed therein, except in formal details given by the statute, by the principles and practice of chancery (2 R. S. 199, § 21, etc.).

The power was given to other courts by Code Procedure, § 388, Code Civil Procedure, § 803.

9. Berdell *v.* Berdell, 86 N. Y. 519.

It is the better opinion that such statutes making parties competent to testify, and allowing them to examine each other before trial, and to compel production of documents, do not necessarily take away the jurisdiction — that is to say, the inherent power — of a court of equity to compel discovery in aid of another action by bill filed for that purpose;[1] but the existence of the remedy

[1] Post *v.* Toledo, &c. R. R. Co., 144 Mass. 341,—a very well considered case.

Jacksonville, &c. R. R. Co., *v.* Peninsula Land, &c. Co. (Fla., 1891), 9 South. Rep. 661, raises, but does not decide, the question.

Shotwell's Exr. *v.* Smith, 20 N. J. Eq. (Green) 79. *Held*, in 1869, that as the New Jersey statute did not enable the court of law to compel the party to answer, but the only penalty was to stay his proceedings, equity was not deprived of its jurisdiction of a bill to enjoin a suit at law, and compel the cancellation of the fraudulently obtained instrument on which it was brought, and to get discovery in aid of that relief.

given by those statutes practically restrains the exercise of that power in all those cases which are so provided for by the statutes that it can no longer be said that there is no plain, adequate, and complete remedy at law.[1]

In other words, the jurisdiction of equity to grant discovery and relief together is not impaired; and its jurisdiction to grant discovery alone in aid of an action at law, it will decline to exercise in those cases where the new procedure gives a plain, adequate, and complete remedy at law. The cases, which have been somewhat inconsiderately arrayed against each other, as if in conflict, are all reconcilable with this principle.

In the New York Code of Civil Procedure there is, as has been noticed, an express provision abolishing suits for discovery merely; but whether under the New York Constitution conferring upon the Supreme Court general jurisdiction in law and equity, it is competent for the Legislature entirely to deprive the court of any recognized branch of its ancient equitable jurisdiction, is at least doubtful. The better opinion is that the statutory prohibition

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Union Passenger R. R. Co. *v.* Mayor &c. of Baltimore, 71 Md. 238 (1889). The statute of 1796,—allowing courts of law to require parties there to make discovery, etc., if they might be compelled to make it in chancery,—*held*, not to take away chancery jurisdiction of a bill for account and discovery of defendant's receipts, on which the city was entitled to a percentage.

Cannon *v.* McNab, 48 Ala. 99, 102 (to the same effect, on a bill for discovery and account, where equity had concurrent jurisdiction as to the account).

In Hoppock's Exrs. *v.* United N. J. R. &c. Co. & Penn. R. R. Co., 27 N. J. Eq. (12 Green), 286, 289, plaintiffs sued for a breach of agreement made by the Delaware and Raritan Canal Company; and alleged that after the cause of action accrued that company was consolidated with the Camden and Amboy Railroad Company by an Act declaring them jointly liable, etc., and that subsequently the joint companies were consolidated with the New Jersey Transportation Company under the name of the first above-named defendant, and the former companies ceased to exist; and that the second above-named defendant now held all the property of the first defendant under a lease which assumed the debts, but it denied all liability. *Held*, that the statutes allowing discovery in actions at law did not impair the jurisdiction of equity; for plaintiff was not bound to experiment at law in order to find out who to sue. The validity of the contract was then considered, and the demurrer overruled.

[1] Paton *v.* Majors, 46 Fed. Rep. 210 (U. S. C. Ct. La., 1891). S. P. in Post *v.* Toledo, &c., R. R. Co. (above cited).

Kearny *v.* Jeffries, 48 Miss. 343, 358 (1873). (Bill by owner of legal title to have deed delivered for record, and get possession. *Dictum* that equity would not try it as if ejectment. Decree for defendant on the pleadings affirmed on the merits.)

Nor does a statute giving a defendant in equity a right to take the testimony of the complainant deprive him of his right to file a cross-bill, and compel discovery on that cross-bill. Millsaps *v.* Pfeiffer, 44 Miss. 805. Compare Brown *v.* Swann, 10 Pet. 497; Heath *v.* Erie Ry. Co., 9 Blatchf. 319; Rindskopf *v.* Platto, 29 Fed. Rep. 130.

relates only to aiding by such suits, actions and defences brought or to be brought in the New York courts under the code itself, and does not necessarily preclude an action in the New York courts under the code for discovery to aid a foreign action.

Under the Massachusetts statute, in a common-law action, interrogatories may afford the same aid as a bill of discovery could ; [1] and bills of discovery merely, in aid of common-law actions in the courts of that State, are therefore practically superseded. And the statute of 1883 goes further, by providing in effect that if a bill in equity asks for relief, discovery can only be had by interrogatories as in an action at law.[2]

The result then may be thus indicated : that notwithstanding the conferring of powers of discovery on common-law courts, equity (unless forbid by a constitution or statute) can still aid a pending or intended action by a bill of discovery, and will do so if the power which might be invoked in the common-law action is not an equally plain, adequate, and complete remedy. If it be such it must be resorted to ; and will be administered by the courts upon the same principles according to which equity proceeds under a bill of discovery.[3]

For another illustration, let us take the co-operation of equity in staying waste, pending a common-law action, and notice the manner in which the equitable power to do so has been by successive steps allowed exercise on motion in an action of a common-law nature : —

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[1] Pub. Sts., c. 129, §§ 46, 53; Baker *v.* Carpenter, 127 Mass. 226 (1879).

[2] Pub. Sts. 1883, c. 223; Amy *v.* Manning, 149 Mass. 487, 491. See Pub. Sts., 838, c. 151, § 8; Id., p. 971, § 49, etc.

[3] Glenney *v.* Stedwell, 64 N. Y. 120; s. c. 1 Abb. N. C. 327, with extended note.

ACTIONS AT LAW[1] AIDED BY SUITS IN EQUITY.

II. STAYING WASTE.

IN EQUITY.	AT LAW.
	WRIT.
BILL.	DECLARATION.
SUBPŒNA.	
TEMPORARY INJUNCTION against waste, pending the action at law,	
Granted on motion, if a *prima facie* case is made out: —	
	PLEA.
	ISSUE JOINED.
	TRIAL and VERDICT.
Injunction dissolved on motion, if plaintiff fails at law.	
	MOTION FOR NEW TRIAL.
Injunction reinstated if plaintiff gets order for new trial.	
	JUDGMENT.
DECREE for permanent injunction after final judgment at law for plaintiff,	
or, for costs and dismissal of bill, after final judgment at law for defendant.	

Note of Case Illustrating this Procedure.

ERHARDT *v.* BOARO, 113 U. S. 527, 537.

Action at Law. — Erhardt, a citizen of New York, sued Boaro and others, citizens of Colorado, to recover possession of a mining claim, from which he alleged defendants had ousted him, and from which they unlawfully withheld possession, to his damage $50,000.

The second count, repeating the facts, added that defendants removed large quantities of ore, of the value of $50,000, to his damage; and plaintiff demanded judgment for $100,000 damages, as well, it seems, as possession.

The defendants claimed title in themselves, and prayed for a judgment of possession and ownership.

Suit in Equity. — Having brought his action for possession, the complainant thereon filed a bill in equity to enjoin the defendants from committing waste pending the action. The bill alleged discovery of claim by plaintiff and his associate, the making of claim,

[1] The action at law is usually, if not always, Ejectment, Trespass *q. c.*, or Trespass on the case for Nuisance or for Waste.

the intrusion of defendants, and the ouster of plaintiff, and that complainant had brought his action at law; that meanwhile defendants were working the claim, and prayed for an injunction against their removing ore "until the final determination of the action at law."

The court granted a preliminary injunction.

Trial of Action at Law. — On a trial of the question of title, in the action at law, defendants obtained a verdict and judgment.

Dismissal of Bill in Equity. — In consequence of defendants obtaining judgment at law, the court of equity dissolved the injunction, and dismissed the bill.

Writ of Error at Law. — Complainant brought error to review the judgment at law.

Appeal in Equity. — He also took an appeal to review the dismissal of the bill in equity.

New Trial at Law. — The Supreme Court, after argument of the writ of error in the action at law, held that defendants were not entitled to the verdict, and ordered a new trial for that purpose, reversing the judgment below, and remanding the cause.

Restoration of Injunction. — A new trial having been ordered in favor of the complainant at law, the Supreme Court, upon argument of the appeal in equity, decreed that the bill and injunction must be reinstated.

The opinion in the suit at law was on the merits of the title, and is not material to the present purpose.

Opinion on Appeal from Dismissal of Bill.

FIELD, J., delivering the opinion of the court on the appeal from the dismissal of the bill in equity, and the dissolving of the injunction, says: —

"This is a suit in equity ancillary to the action for the possession of the mining claim, just decided. It is brought to restrain the commission of waste by the defendants pending the action."

After stating the facts, proceeds: —

"It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In Pillsworth *v.* Hopton, 6 Ves. 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench 'that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.'

"This doctrine has been greatly modified in modern times, and it is now a common practice, in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. Jerome *v.* Ross, 7 Johns. Ch. 315, 332; Le Roy *v.* Wright, 4 Sawyer, 530, 535.

"As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues.

"The decree of the court below must therefore be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered."

In contrast with this method of co-operation of the different systems, let us notice the improved procedure when the court of common-law jurisdiction is clothed with appropriate equitable powers: —

EQUITABLE REMEDIES GRAFTED ON LEGAL ACTIONS.

II. STAYING WASTE.

COMMON LAW ACTION IN NEW YORK BEFORE THE CODE.	ACTION UNDER NEW YORK CODE.
WRIT.	SUMMONS.
1813. By 1 R. L. of 1813, p. 88, § 29, a tenant of land in controversy was forbidden to make waste, and the common-law courts were directed to keep the land at the suit of the demandant, should the tenant violate the statute.	
1830. That Act, which was understood to relate to actions to recover land, was now extended to the action of ejectment for possession, by 2 R. S. 336, § 18, the power of the court now being defined as "power, on the application of the plaintiff, to make an order restraining the defendant from the commission of any further waste thereon."	
	1849. The Code of Procedure recognized the practice granting injunctions in equity, and introduced provisions allowing them also in common-law actions to restrain acts pending the suit and tending to render judgment ineffectual (§ 219), and left the statutory power to stay waste, by order in ejectment, untouched.
	1880. The Code of Civil Procedure, while continuing the provisions as to injunctions (§§ 603, 604), also by § 1681 re-enacted and extended the remedy by order to stay waste by allowing it to be made (even without notice and without security) in all actions, legal or equitable, affecting the title to, or the possession, use, or enjoyment of, real property, and to staying damages of any kind to the property, and this without prejudice to the right to an injunction also in any proper case. The remedy is in its nature an injunction, and the court, or a judge thereof, doubtless may in a single order exercise the power involved in both remedies.

It will be seen from these illustrations that however premature the expectation that law and equity would be "merged" by codes of procedure, and however impracticable such a complete union may appear to many, the assimilation, and to some extent the merger, of procedure is in the full course of progress. It is a curious instance of this that the Massachusetts statute, which was framed to allow ready discovery through machinery added to the common-law actions, for which it was needed, has been found to present so great an improvement over the bill of discovery that, by a later statute, whatever discovery is sought in a bill for relief must be obtained through this new common-law machinery, which, first imitating the equitable remedy for common-law use, has now thus superseded the old machinery of equity even for equity uses.[1] In other words, equity no longer lends its ancient instrument to aid suitors at law, but has been directed to lay it aside even from use in its own causes, and borrow for that use the improvement invented in common-law courts to enable them to get on without the interference of equity.

Austin Abbott.

NEW YORK, May 2, 1893.

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[1] Amy *v.* Manning, 149 Mass. 487.